NO. 21196

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN EARL ALFORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, Southern Division, adjudging appellant to be guilty as charged in a one-count indictment following a non-jury trial.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2312 and 3231. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was tried under a one-count indictment which also included George Owen Donnelly and Raymond Waxler as named co-defendants. The indictment charged that appellant, Donnelly, and Waxler transported a stolen 1965 Chevrolet Impala vehicle from El Monte, California, through the Southern Division of the Southern District of California, to Tijuana, Mexico, knowing the vehicle to have been stolen [C. T. 2]. 1/

Appellant waived the right to trial by jury on April 19, 1966 [C. T. 3]. The case was severed as to defendant Waxler, and appellant and Donnelly were tried together before United States District Judge Fred Kunzel. The trial commenced on April 19, 1966, and appellant and Donnelly were found guilty as charged on April 20, 1966 [R. T. 6, 162]. 2/

Thereafter, on May 20, 1966, appellant was committed to the custody of the Attorney General for treatment and supervision as a Youth Offender, until discharged by the Board of Parole [C. T. 5]. Appellant thereafter filed notice of appeal [C. T. 6].

1/ "C. T." refers to the Clerk's Transcript, which is Vol. I of the Transcript of Record.

2/ "R. T." refers to the Reporter's Transcript, which is Vol. 2 of the Transcript of Record.

III

ERROR SPECIFIED

The only error alleged by appellant concerns the claim that the evidence was insufficient to sustain the conviction.

IV

STATEMENT OF THE FACTS

On February 20, 1966, a 1965 Chevrolet was missing from the John Fair Plymouth automobile lot in Alhambra [R. T. 10, 13, 70, 90-91]. The vehicle was owned by the John Fair Company. It was on the lot on the night of February 19. The used car manager at the lot noticed that the Chevrolet was missing before 10:00 a. m. on February 20 [R. T. 70, 74, 90-91].

The theft of the vehicle was later reported to the police [R. T. 13, 91]. At the John Fair lot, salesmen were not allowed to take company vehicles home (except for their own demonstration vehicles), and customers were not allowed to take vehicles away in absence of execution of borrowed-car agreements, unless they were accompanied by salesmen [R. T. 76-79].

The Chevrolet was observed in Tijuana, Mexico, by Special Agent Henry A. Webb of the Federal Bureau of Investigation on February 21, 1966. It had the same license number and vehicle identification number as the vehicle missing from the John Fair lot [R. T. 71-73, 120-21, 129-30]. The vehicle then contained an impound sticker showing that it had been sent to that location

(Triple A Garage) by Agent Meza of the Tijuana Police Department on February 20 [R. T. 130].

Agent Meza had sent the vehicle (which he identified by license plate number, a dent in the fender, and clothing in a bag) to the Triple A Garage [R. T. 112-13, 142-45]. He testified that he did this after observing a transaction involving the missing 1965 Chevrolet, a 1956 Checrolet, and four persons -- Waxler, Donnelly, Mrs. Coral Oldham, and one other female [R. T. 105, 108-111]. Waxler testified concerning the same transaction involving the 1965 Chevrolet and the Mexican police [R. T. 56-58].

In reference to the 1965 Chevrolet involved in the transaction, Waxler testified that he saw appellant driving that vehicle in the United States on the night of February 19, 1966 [R. T. 39, 48, 62]. Earlier that evening, appellant Alford, Waxler, Donnelly, and two girls met at a house in El Monte, California, and decided to take a trip to Tijuana [R. T. 39-41].

They left in Waxler's vehicle. They arrived in Alhambra after midnight, and appellant and Donnelly got out of the vehicle, said they had some business to attend to, and told Waxler, "We'll catch you in a few minutes." [R. T. 42, 43, 46]. A few minutes later appellant and Donnelly caught up with Waxler's vehicle. Appellant was then driving the 1965 Chevrolet [R. T. 47-48]. Appellant and Donnelly drove the 1965 Chevrolet from Alhambra to Tijuana, Mexico, appellant driving it about half of the distance [R. T. 46-49, 62].

The John Fair lot was on Valley Boulevard, directly across

the street from a bowling alley. Waxler had left appellant and Donnelly at a bowling alley, which he believed was on Valley in Alhambra, before they returned with the 1965 Chevrolet [R. T. 44-45, 74-75].

Appellant presented no evidence [R. T. 149].

V

ARGUMENT

Appellant was charged with knowingly transporting a stolen automobile in foreign commerce from El Monte, California, to Tijuana, Mexico. There was evidence that appellant drove a 1965 Chevrolet during part of the trip from Alhambra, California, to Tijuana, Mexico [R. T. 46-49, 62]. This would have constituted aiding and abetting under Title 18, United States Code, Section 2, if the vehicle was stolen and appellant had knowledge of the theft and the plan for transportation in foreign commerce.

The testimony of Waxler was sufficient to establish knowledge of the intended trip [R. T. 39-41], when applied in the light of the well-recognized rule that the evidence upon appeal is viewed in the light most favorable to the appellee.

Hiram v. United States, 354 F. 2d 4, 7
(9th Cir. 1965);

Davenport v. United States, 260 F. 2d 591, 598
(9th Cir. 1958), cert. denied,
359 U. S. 909 (1959).

The remaining element (knowledge of the theft) was established by the application of the well-known inference that may be drawn from evidence of possession of recently-stolen property:

> "From the possession of the stolen securities there arises not only an inference which the jury may draw, but a presumption (supra) which must be recognized by the jury that the possessor is the thief. . . . It is a part of the common experience of man that the possessor of goods soon after a theft is the thief."
>
> Booth v. United States, 154 F. 2d 73, 75 (9th Cir. 1946).

This presumption also applies to automobile thefts under the statute involved in the instant case.

> Morandy v. United States, 170 F. 2d 5 (9th Cir. 1948), cert. denied, 336 U.S. 938 (1949).

Appellant has not contested the application of the rules of aiding and abetting, nor has he contested the validity of the rule that permits an inference that the possessor of recently-stolen property is the thief. His position rests entirely upon the theory that there was insufficient evidence that the vehicle was stolen by anyone and insufficient evidence that the vehicle in Tijuana was the same vehicle that was alleged to have been stolen.

There was clear evidence that someone stole a 1965 Chevrolet from the John Fair lot in Alhambra. It was on the lot on the night of February 19, 1966, and was missing on the morning of February 20. Salesmen could not take vehicles of this type away

from the lot for their own personal purposes, and customers could not take vehicles away in absence of execution of borrowed-car agreements, unless they were accompanied by salesmen [R.T. 76-79]. The theft was reported to the police [R.T. 13, 91]. Appellant refers to "sloppy practices" at John Fair Plymouth, but appellee can find nothing in the record to support this allegation. Even the reference at trial to alleged "sloppy practices" is not part of the evidence in the record, but is merely an argumentative remark by counsel for co-defendant Donnelly [R.T. 94].

The stolen vehicle was identified by license plate number and engine number [R.T. 71-73]. The vehicle observed by Agent Webb in Tijuana had the same license plate number and same engine number [R.T. 121, 129-30]. At this point it was established that the vehicle was stolen and that someone transported it in foreign commerce. The remaining essential link in the proof is the evidence that the vehicle which was driven by appellant was the same vehicle that Agent Webb observed in the Triple A facility at Tijuana, bearing a sticker showing that it had been sent to that location by Agent Meza of the Tijuana Police Department on February 20 [R.T. 130]. The vehicle that he had sent to that location was the one involved in the transaction involving a 1965 Chevrolet, a 1956 Chevrolet, and four persons, including Waxler, Donnelly, and Mrs. Oldham [R.T. 105, 108-111]. This was the same vehicle that appellant had been driving in the United States [R.T. 46-49, 56-58].

The only remaining question concerns the identification by

Agent Meza of the vehicle he observed in the Triple A facility (identified in part by the same license plate number mentioned above, R. T. 142-45) as being the vehicle involved in the two-Chevrolet incident observed by Agent Meza and Waxler. Agent Meza testified that it was the same vehicle. He identified it by license plate number, a dent in the fender, and clothing in a bag [R. T. 142-145]. His testimony is supported by the testimony of Agent Webb, who saw Agent Meza's impound sticker upon the stolen vehicle at the Triple A facility [R. T. 121, 129-30]. Thus, it was clearly established that the vehicle that was stolen was the one driven by appellant and also was the one that was seen in Mexico.

This Court has held that the identity of a vehicle may be established by license plate number:

> "Appellant's contention that the vehicle was not sufficiently identified is untenable. The California license plates found among appellant's belongings matched the plate numbers which the Avis rental agent testified were on the Ford when it was rented."
>
> Bouchard v. United States, 344 F. 2d 872, 876 (9th Cir. 1965).

In Morandy, supra, evidence of identity was sufficiently established by motor number, and the motor number that was presented to the jury was incomplete (at pp. 5-6). In the instant case, identity was established by identification number (Agent Webb's testimony) and license plate number (testimony of both

Agent Webb and Agent Meza).

An automobile may be identified by the number stamped upon it by the manufacturer.

52 C.J.S. 938 (Section 116c.)

Of the cases cited by appellant, only two are concerned with the question of identity of vehicles. These are Cox v. United States, 96 F.2d 41 (8th Cir. 1938), and Thompson v. United States, 334 F.2d 207 (5th Cir. 1964).

Cox apparently involved a total lack of proof that the stolen vehicle was the same vehicle that was transported. Unlike the facts of the instant case, the opinion indicates that the identification was limited to model, type, and style.

Thompson, supra, involved serial numbers that were similar but not identical:

Stolen Vehicle: 01837 L 123003

Transported Vehicle: 10837 L 123003

Should the opinion be interpreted as holding that evidence of identical serial numbers would be insufficient to establish identity, the decision would lack consistency with this Court's rulings in Bouchard and Morandy, supra, involving lesser degrees of proof. However, it is not necessary to determine whether Thompson is consistent with the rulings in this Circuit, because the instant case involves identification by engine number as well as license plate number.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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